

EXHIBIT 11

ARBITRATION FAIRNESS ACT, 111TH CONGRESS:
TEXTS OF THE HOUSE AND SENATE BILLS

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111TH CONGRESS
1ST SESSION

H. R. 1020

To amend chapter 1 of title 9 of United States Code with respect to arbitration.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 12, 2009

Mr. JOHNSON of Georgia (for himself, Mr. MILLER of North Carolina, Ms. SCHAKOWSKY, Mr. BISHOP of Georgia, Ms. LEE of California, Mr. LOEBSACK, Mr. NADLER of New York, Mr. CHANDLER, Mr. PATRICK J. MURPHY of Pennsylvania, Mr. SCOTT of Virginia, Mr. PASTOR of Arizona, Mr. LATOURETTE, Mr. DOGGETT, Mr. CONYERS, Mr. DELAHUNT, Mr. STUPAK, Ms. WASSERMAN SCHULTZ, Ms. MCCOLLUM, Mr. COURTNEY, Ms. BALDWIN, Mr. DEFazio, Mrs. LOWEY, Mr. HIGGINS, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. GUTIERREZ, Mr. BRALEY of Iowa, Mr. MARKEY of Massachusetts, Mrs. MALONEY, Mr. WATT, Mr. CARSON of Indiana, Mr. GEORGE MILLER of California, Ms. JACKSON-LEE of Texas, Mr. BOSWELL, Mr. SKELTON, Mr. BARROW, Mr. STARK, and Ms. LINDA T. SANCHEZ of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 1 of title 9 of United States Code with respect to arbitration.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the "Arbitration Fairness
- 5 Act of 2009".

1 SEC. 2. FINDINGS.

2 The Congress finds the following:

3 (1) The Federal Arbitration Act (now enacted
4 as chapter 1 of title 9 of the United States Code)
5 was intended to apply to disputes between commer-
6 cial entities of generally similar sophistication and
7 bargaining power.

8 (2) A series of United States Supreme Court
9 decisions have changed the meaning of the Act so
10 that it now extends to disputes between parties of
11 greatly disparate economic power, such as consumer
12 disputes and employment disputes. As a result, a
13 large and rapidly growing number of corporations
14 are requiring millions of consumers and employees
15 to give up their right to have disputes resolved by
16 a judge or jury, and instead submit their claims to
17 binding arbitration.

18 (3) Most consumers and employees have little
19 or no meaningful option whether to submit their
20 claims to arbitration. Few people realize, or under-
21 stand the importance of the deliberately fine print
22 that strips them of rights; and because entire indus-
23 tries are adopting these clauses, people increasingly
24 have no choice but to accept them. They must often
25 give up their rights as a condition of having a job,
26 getting necessary medical care, buying a car, open-

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1 ing a bank account, getting a credit card, and the
2 like. Often times, they are not even aware that they
3 have given up their rights.

4 (4) Private arbitration companies are some-
5 times under great pressure to devise systems that
6 favor the corporate repeat players who decide wheth-
7 er those companies will receive their lucrative busi-
8 ness.

9 (5) Mandatory arbitration undermines the de-
10 velopment of public law for civil rights and consumer
11 rights, because there is no meaningful judicial review
12 of arbitrators' decisions. With the knowledge that
13 their rulings will not be seriously examined by a
14 court applying current law, arbitrators enjoy near
15 complete freedom to ignore the law and even their
16 own rules.

17 (6) Mandatory arbitration is a poor system for
18 protecting civil rights and consumer rights because
19 it is not transparent. While the American civil jus-
20 tice system features publicly accountable decision
21 makers who generally issue written decisions that
22 are widely available to the public, arbitration offers
23 none of these features.

24 (7) Many corporations add to their arbitration
25 clauses unfair provisions that deliberately tilt the

1 systems against individuals, including provisions
 2 that strip individuals of substantive statutory rights,
 3 ban class actions, and force people to arbitrate their
 4 claims hundreds of miles from their homes. While
 5 some courts have been protective of individuals, too
 6 many courts have upheld even egregiously unfair
 7 mandatory arbitration clauses in deference to a sup-
 8 posed Federal policy favoring arbitration over the
 9 constitutional rights of individuals.

10 **SEC. 3. DEFINITIONS.**

11 Section 1 of title 9, United States Code, is amend-
 12 ed—

13 (1) by amending the heading to read as follows:

14 “§ 1. Definitions”;

15 (2) by inserting before “‘Maritime’” the fol-
 16 lowing:

17 “As used in this chapter—”;

18 (3) by striking “‘Maritime transactions’” and
 19 inserting the following:

20 “(1) ‘maritime transactions’”;

21 (4) by striking “commerce” and inserting the
 22 following:

23 “(2) ‘commerce’”;

1 (5) by striking “, but nothing” and all that fol-
 2 lows through the period at the end, and inserting a
 3 semicolon; and

4 (6) by adding at the end the following:

5 “(3) ‘employment dispute’, as herein defined,
 6 means a dispute between an employer and employee
 7 arising out of the relationship of employer and em-
 8 ployee as defined by the Fair Labor Standards Act;

9 “(4) ‘consumer dispute’, as herein defined,
 10 means a dispute between a person other than an or-
 11 ganization who seeks or acquires real or personal
 12 property, services, money, or credit for personal,
 13 family, or household purposes and the seller or pro-
 14 vider of such property, services, money, or credit;

15 “(5) ‘franchise dispute’, as herein defined,
 16 means a dispute between a franchisor and franchisee
 17 arising out of or relating to contract or agreement
 18 by which—

19 “(A) a franchisee is granted the right to
 20 engage in the business of offering, selling, or
 21 distributing goods or services under a mar-
 22 keting plan or system prescribed in substantial
 23 part by a franchisor;

24 “(B) the operation of the franchisee’s busi-
 25 ness pursuant to such plan or system is sub-

1 stantially associated with the franchisor's trade-
 2 mark, service mark, trade name, logotype, ad-
 3 vertising, or other commercial symbol desig-
 4 nating the franchisor or its affiliate; and

5 “(C) the franchisee is required to pay, di-
 6 rectly or indirectly, a franchise fee; and

7 “(6) ‘pre-dispute arbitration agreement’, as
 8 herein defined, means any agreement to arbitrate
 9 disputes that had not yet arisen at the time of the
 10 making of the agreement.”.

11 **SEC. 4. VALIDITY AND ENFORCEABILITY.**

12 Section 2 of title 9, United States Code, is amend-
 13 ed—

14 (1) by amending the heading to read as follows:

15 **“§ 2. Validity and enforceability”,**

16 (2) by inserting “(a)” before “A written”;

17 (3) by striking “, save” and all that follows
 18 through “contract”, and inserting “to the same ex-
 19 tent as contracts generally, except as otherwise pro-
 20 vided in the title”; and

21 (4) by adding at the end the following:

22 “(b) No predispute arbitration agreement shall be
 23 valid or enforceable if it requires arbitration of—

24 “(1) an employment, consumer, or franchise
 25 dispute; or

7

1 “(2) a dispute arising under any statute in-
2 tended to protect civil rights.

3 “(c) An issue as to whether this chapter applies to
4 an arbitration agreement shall be determined by Federal
5 law. Except as otherwise provided in this chapter, the va-
6 lidity or enforceability of an agreement to arbitrate shall
7 be determined by the court, rather than the arbitrator,
8 irrespective of whether the party resisting arbitration chal-
9 lenges the arbitration agreement specifically or in conjunc-
10 tion with other terms of the contract containing such
11 agreement.

12 “(d) Nothing in this chapter shall apply to any arbi-
13 tration provision in a collective bargaining agreement.”.

14 **SEC. 5. EFFECTIVE DATE.**

15 This Act, and the amendments made by this Act,
16 shall take effect on the date of the enactment of this Act
17 and shall apply with respect to any dispute or claim that
18 arises on or after such date.

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II

111TH CONGRESS
1ST SESSION

S. 931

To amend title 9 of the United States Code with respect to arbitration.

IN THE SENATE OF THE UNITED STATES

APRIL 29, 2009

Mr. FEINGOLD (for himself, Mr. DURBIN, Mr. KERRY, Mr. WHITEHOUSE, Mr. WYDEN, Mr. UDALL of New Mexico, Mr. MERKLEY, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 9 of the United States Code with respect to arbitration.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Arbitration Fairness
5 Act of 2009".

6 **SEC. 2. FINDINGS.**

7 The Congress finds the following:

8 (1) The Federal Arbitration Act (now enacted
9 as chapter 1 of title 9 of the United States Code)
10 was intended to apply to disputes between commer-

1 cial entities of generally similar sophistication and
2 bargaining power.

3 (2) A series of United States Supreme Court
4 decisions have changed the meaning of the Act so
5 that it now extends to disputes between parties of
6 greatly disparate economic power, such as consumer
7 disputes and employment disputes. As a result, a
8 large and rapidly growing number of corporations
9 are forcing millions of consumers and employees to
10 give up their right to have disputes resolved by a
11 judge or jury, and instead submit their claims to
12 binding arbitration.

13 (3) Most consumers and employees have little
14 or no meaningful option whether to submit their
15 claims to arbitration. Few people realize or under-
16 stand the importance of the deliberately fine print
17 that strips them of rights, and because entire indus-
18 tries are adopting these clauses, people increasingly
19 have no choice but to accept them. They must often
20 give up their rights as a condition of having a job,
21 getting necessary medical care, buying a car, open-
22 ing a bank account, getting a credit card, and the
23 like. Often times, they are not even aware that they
24 have given up their rights.

1 (4) Private arbitration companies are some-
2 times under great pressure to devise systems that
3 favor the corporate repeat players who decide wheth-
4 er those companies will receive their lucrative busi-
5 ness.

6 (5) Mandatory arbitration undermines the de-
7 velopment of public law for civil rights and consumer
8 rights because there is no meaningful judicial review
9 of arbitrators' decisions. With the knowledge that
10 their rulings will not be seriously examined by a
11 court applying current law, arbitrators enjoy near
12 complete freedom to ignore the law and even their
13 own rules.

14 (6) Mandatory arbitration is a poor system for
15 protecting civil rights and consumer rights because
16 it is not transparent. While the American civil jus-
17 tice system features publicly accountable decision
18 makers who generally issue public, written decisions,
19 arbitration often offers none of these features.

20 (7) Many corporations add to arbitration
21 clauses unfair provisions that deliberately tilt the
22 systems against individuals, including provisions
23 that strip individuals of substantive statutory rights,
24 ban class actions, and force people to arbitrate their
25 claims hundreds of miles from their homes. While

1 some courts have been protective of individuals, too
 2 many courts have erroneously upheld even egre-
 3 giously unfair mandatory arbitration clauses in def-
 4 erence to a supposed Federal policy favoring arbitra-
 5 tion over the constitutional rights of individuals.

6 **SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, FRAN-**
 7 **CHISE, AND CIVIL RIGHTS DISPUTES.**

8 (a) IN GENERAL.—Title 9 of the United States Code
 9 is amended by adding at the end the following:

10 **“CHAPTER 4—ARBITRATION OF EMPLOY-**
 11 **MENT, CONSUMER, FRANCHISE, AND**
 12 **CIVIL RIGHTS DISPUTES**

“Sec.

“401. Definitions.

“402. Validity and enforceability.

13 **“§ 401. Definitions**

14 “In this chapter—

15 “(1) the term ‘civil rights dispute’ means a dis-
 16 pute—

17 “(A) arising under—

18 “(i) the Constitution of the United
 19 States or the constitution of a State; or

20 “(ii) a Federal or State statute that
 21 prohibits discrimination on the basis of
 22 race, sex, disability, religion, national ori-
 23 gin, or any invidious basis in education,
 24 employment, credit, housing, public accom-

1 modations and facilities, voting, or pro-
2 gram funded or conducted by the Federal
3 Government or State government, includ-
4 ing any statute enforced by the Civil
5 Rights Division of the Department of Jus-
6 tice and any statute enumerated in section
7 62(e) of the Internal Revenue Code of
8 1986 (relating to unlawful discrimination);
9 and

10 “(B) in which at least 1 party alleging a
11 violation of the Constitution of the United
12 States, a State constitution, or a statute pro-
13 hibiting discrimination is an individual;

14 “(2) the term ‘consumer dispute’ means a dis-
15 pute between a person other than an organization
16 who seeks or acquires real or personal property,
17 services (including services relating to securities and
18 other investments), money, or credit for personal,
19 family, or household purposes and the seller or pro-
20 vider of such property, services, money, or credit;

21 “(3) the term ‘employment dispute’ means a
22 dispute between an employer and employee arising
23 out of the relationship of employer and employee as
24 defined in section 3 of the Fair Labor Standards
25 Act of 1938 (29 U.S.C. 203);

1 “(4) the term ‘franchise dispute’ means a dis-
 2 pute between a franchisee with a principal place of
 3 business in the United States and a franchisor aris-
 4 ing out of or relating to contract or agreement by
 5 which—

6 “(A) a franchisee is granted the right to
 7 engage in the business of offering, selling, or
 8 distributing goods or services under a mar-
 9 keting plan or system prescribed in substantial
 10 part by a franchisor;

11 “(B) the operation of the franchisee’s busi-
 12 ness pursuant to such plan or system is sub-
 13 stantially associated with the franchisor’s trade-
 14 mark, service mark, trade name, logotype, ad-
 15 vertising, or other commercial symbol desig-
 16 nating the franchisor or its affiliate; and

17 “(C) the franchisee is required to pay, di-
 18 rectly or indirectly, a franchise fee; and

19 “(5) the term ‘predispute arbitration agree-
 20 ment’ means any agreement to arbitrate a dispute
 21 that had not yet arisen at the time of the making
 22 of the agreement.

23 **“§ 402. Validity and enforceability**

24 “(a) IN GENERAL.—Notwithstanding any other pro-
 25 vision of this title, no predispute arbitration agreement

1 shall be valid or enforceable if it requires arbitration of
 2 an employment, consumer, franchise, or civil rights dis-
 3 pute.

4 “(b) APPLICABILITY.—

5 “(1) IN GENERAL.—An issue as to whether this
 6 chapter applies to an arbitration agreement shall be
 7 determined under Federal law. The applicability of
 8 this chapter to an agreement to arbitrate and the
 9 validity and enforceability of an agreement to which
 10 this chapter applies shall be determined by the
 11 court, rather than the arbitrator, irrespective of
 12 whether the party resisting arbitration challenges
 13 the arbitration agreement specifically or in conjunc-
 14 tion with other terms of the contract containing such
 15 agreement.

16 “(2) COLLECTIVE BARGAINING AGREEMENTS.—
 17 Nothing in this chapter shall apply to any arbitra-
 18 tion provision in a contract between an employer and
 19 a labor organization or between labor organizations,
 20 except that no such arbitration provision shall have
 21 the effect of waiving the right of an employee to
 22 seek judicial enforcement of a right arising under a
 23 provision of the Constitution of the United States, a
 24 State constitution, or a Federal or State statute, or
 25 public policy arising therefrom.”.

1 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

2 (1) IN GENERAL.—Title 9 of the United States
3 Code is amended—

4 (A) in section 1, by striking “of seamen,”
5 and all that follows through “interstate com-
6 merce”;

7 (B) in section 2, by inserting “or as other-
8 wise provided in chapter 4” before the period at
9 the end;

10 (C) in section 208—

11 (i) in the section heading, by striking
12 **“Chapter 1; residual application”**
13 and inserting **“Application”**; and

14 (ii) by adding at the end the fol-
15 lowing: “This chapter applies to the extent
16 that this chapter is not in conflict with
17 chapter 4.”; and

18 (D) in section 307—

19 (i) in the section heading, by striking
20 **“Chapter 1; residual application”**
21 and inserting **“Application”**; and

22 (ii) by adding at the end the fol-
23 lowing: “This chapter applies to the extent
24 that this chapter is not in conflict with
25 chapter 4.”.

1 (2) TABLE OF SECTIONS.—

2 (A) CHAPTER 2.—The table of sections for
3 chapter 2 of title 9, United States Code, is
4 amended by striking the item relating to section
5 208 and inserting the following:

"208. Application."

6 (B) CHAPTER 3.—The table of sections for
7 chapter 3 of title 9, United States Code, is
8 amended by striking the item relating to section
9 307 and inserting the following:

"307. Application."

10 (3) TABLE OF CHAPTERS.—The table of chap-
11 ters for title 9, United States Code, is amended by
12 adding at the end the following:

"4. Arbitration of employment, consumer, franchise, and civil rights dis-
putes 401".

13 SEC. 4. EFFECTIVE DATE.

14 This Act, and the amendments made by this Act,
15 shall take effect on the date of enactment of this Act and
16 shall apply with respect to any dispute or claim that arises
17 on or after such date.

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